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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RILEY NGUYEN, Defendant and Appellant.	C086305 (Super. Ct. No. 17FE010115)

After attending a concert, defendant Riley Nguyen became infatuated with the band's lead singer and began sending her unwanted social media messages. He also began sending threatening messages to the band's guitarist and his girlfriend. A jury found defendant guilty of making criminal threats against the guitarist and his girlfriend, but found him not guilty of stalking the singer. The court suspended imposition of sentence and placed him on five years of probation.

Defendant's appointed counsel filed an opening brief setting forth the facts of the case and asked this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436. (*Wende*).) Finding no arguable error that would result in a disposition more favorable to defendant, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We provide the following brief description of the facts and procedural history of defendant's case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

In August 2016, defendant met the singer at one of her concerts in Sacramento. Apparently, he volunteered to sell merchandise at the concert. At the time, defendant lived in Elk Grove, and she lived in Nashville.

In addition to attending her Sacramento concert, defendant later attended one of the singer's concerts in Pensacola, Florida. He purchased tickets to attend concerts in Little Rock, Arkansas and Anaheim, California as well.

Defendant began sending the singer social media messages using Twitter[1] and Instagram, attempting to court her. In October 2016, the singer hired H.W. to play guitar for her. At the time, H.W. was dating R.G. While R.G. was not a member of the band, she attended many of its concerts and hung out with the group backstage before and after the shows. Like the singer, H.W. and R.G. also had Twitter accounts.

Defendant came to believe that H.W. and R.G. were hindering the singer's career. He also apparently blamed H.W. (whom he referred to as "Plucky") as the reason that the singer did not respond to his communications.

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1 "Twitter" is a social media Web site on the Internet that allows users to post short messages, known as "tweets," that may be addressed to, and/or be visible by, other users.

In May 2017, defendant tweeted a series of threatening messages from multiple Twitter accounts and included H.W.'s and R.G.'s Twitter handles,[2] which meant they would receive notifications of those tweets.

In one tweet, defendant told H.W. he was "gonna make u shed blood." In another, which defendant sent to H.W., R.G., and a third individual not involved here, defendant stated, "My pockets ain't empty and neither is my ability to murder u 3." To H.W., defendant also tweeted, "Watch me shoot u in redding ca," "You're going underwater," "Nothing is gonna save you in Redding, CA," and, "call 911. Tic Toc til June, plucky. It's murder," and, "I'm done playing pretend." He individually tweeted to H.W., "[D]on't hide," and to Rachel, "[D]on't run."

Defendant also tweeted messages to the singer, asking if she loved him and claiming he wanted to start a family with her. H.W. and the singer were concerned and fearful, given the differences in the tweets directed at them.

Although neither the singer, nor H.W. or R.G. lived in California, they were concerned because they had upcoming concerts scheduled in the state, and they believed defendant had sent the tweets from Elk Grove. The singer and H.W. had a show scheduled in Anaheim for early June 2017, and they were informed that defendant had purchased a ticket for the Anaheim show.

The singer and H.W. also had a show scheduled later in June in Redding. They took defendant's repeated references to Redding in his tweets to mean he intended to carry out his threats against them when they came to Redding for the concert in June. Both H.W. and R.G. intended to be at the Redding show, but R.G. later decided not to attend any of the California shows because defendant's tweets scared her.

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[2] A "Twitter handle" is a username selected by an individual using Twitter. (See fn. 2, *ante*.)

According to H.W., defendant's threatening tweets scared him, and he took them seriously. He knew Redding was close to Elk Grove, where defendant resided and from where the tweets originated, and he was aware that defendant had previously traveled to the singer's shows in Arkansas and Florida, where he gave her a bag of gifts, including a ring. H.W. was also aware that defendant had relocated to Nashville for a few months where the singer's record label was located and close to where she lived at the time.

H.W. eventually contacted police in California, and Detective Nate Lange from the Elk Grove Police Department investigated the matter. Defendant admitted during a recorded interview with Detective Lange that he had sent threatening tweets to H.W. and R.G., but claimed the threats were "empty," meaning they were "all bark, no bite." The recorded interview was played for the jury.

The singer eventually obtained a restraining order against defendant. He continued to send her tweets and also sent threatening tweets to H.W. and R.G., even after the restraining order.

Defendant was charged with stalking the singer between August 12, 2016, and May 30, 2017, in violation of a court order (Pen. Code, § 646.9, subd. (b)—count one),[3] making a criminal threat against R.G. between May 25 and May 30, 2017 (§ 422—count two), and making a criminal threat against H.W. between May 25 and May 30, 2017 (§ 422—count three). Defendant denied the charges.

The jury found defendant not guilty of the stalking charge, but found him guilty of both criminal threat counts. The trial court suspended the imposition of sentence and placed defendant on formal probation for five years. It ordered defendant to stay away from the singer, R.G., and H.W.

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3 Undesignated statutory references are to the Penal Code.

The court imposed a $300 restitution fine (§ 1202.4, subd. (b)) and a $300 probation revocation restitution fine (§ 1202.44), which was stayed unless probation was revoked. The court imposed a $60 criminal conviction assessment (Gov. Code, § 70373), an $80 court operations assessment (Pen. Code, § 1465.8), and a $402.38 jail booking fee and a $99.19 jail classification fee under Government Code section 29550.2. Defendant timely appealed.

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief setting forth the facts of the case and requesting that this court review the record to determine whether there are any arguable issues on appeal. (*Wende*, *supra*, 25 Cal.3d 436.) Defendant was advised of his right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief raising several issues but did not include any citations to the record or supporting legal authority. It is not the court's task to search the record for evidence that supports the statements in an appellate brief; it is the appellant's responsibility to cite the court to evidence in the record. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1310, fn. 3; *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738 [appellant has the burden to refer appellate court to the portion of the record supporting his contentions on appeal].)

Not only must an appellate brief "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears" (Cal. Rules of Court, rule 8.204(a)(1)(C)),[4] it must also support each point by argument and, if possible, by citation of authority (rule 8.204(a)(1)(B)). Because defendant failed to cite the record to support his appellate contentions, and cites no supporting legal

[4] Further undesignated rule references are to the California Rules of Court.

authority, we may treat the points as waived or forfeited. (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826, fn. 1 ["[u]pon the party's failure" to comply with rule 8.204 "the appellate court need not consider or may disregard the matter"]; see *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 [absence of legal argument and citation to authorities to support contentions results in forfeiture].)

Even if defendant had not forfeited his claims, his contentions on appeal lack merit. Defendant first contends H.W. and the singer negligently failed to fully explain to Detective Lange how Twitter works before he was charged. In his view, had they done so, he would not have been charged with stalking and criminal threats.

Yet, it was the prosecutor who decided to charge defendant. "Prosecutors have broad discretion to decide whom to charge, and for what crime." (*People v. Lucas* (1995) 12 Cal.4th 415, 477.) " '[I]t is well established, of course, that a district attorney's enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he [or she] has committed a crime.' " (*Ibid.*) Because it was ultimately the prosecutor's decision to charge defendant, and not Detective Lange's, it is irrelevant whether H.W. and the singer fully explained Twitter to him. (*Id.* at p. 478 [factual predicates for the prosecutor's charging decision should not be subject to scrutiny unless there is a claim of invidious discrimination or vindictive prosecution; court rejected the defendant's claim that without allegedly misleading or false information from trial prosecutor to his supervisors, the district's attorney's office might not have elected to charge special circumstances and seek the death penalty in the case].) Furthermore, defendant cites no evidence in the record showing that Detective Lange did not understand how Twitter worked.

In a related argument, defendant contends R.G. had a fiduciary duty to explain to Detective Lange how Twitter worked. He is incorrect. Nothing in the record shows R.G. and defendant even knew each other, let alone had any type of fiduciary relationship.

"[A] fiduciary relationship is ' "any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . . ." ' " (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338.) " ' "[B]efore a person can be charged with a fiduciary obligation, he [or she] must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." ' " (*Ibid.*) "[E]xamples of relationships that impose a fiduciary obligation to act on behalf of or for the benefit of another are 'a joint venture, a partnership, or an agency.' " (*Id.* at p. 1339.)

Here, the evidence in the record shows that defendant told police that he did not know if the victims even knew him. R.G. testified that she had no prior contact with defendant, and had never met him. Similarly, H.W. testified that he had never met defendant before the tweets started. And the singer testified that although she may have met defendant at a concert, she could not remember him from the 200 or 300 people coming through the "meet and greet" line after the concert. She also never responded to any of defendant's tweets.

Given the undisputed evidence in the record, nothing close to a fiduciary relationship existed between defendant and R.G., or any of the victims. In the absence of any fiduciary relationship, R.G. owed defendant no fiduciary duty to explain Twitter to law enforcement.

Finally, defendant contends that the court erred by trying all three charged crimes jointly. He essentially argues the court should have severed the counts and tried them separately.

Defendant did not raise the severance issue below and has therefore forfeited his appellate contention. It is well-settled that a defendant's failure to make a timely and *specific* objection on the ground asserted on appeal makes that ground not cognizable. (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

We cannot fault the trial court for trying the counts together when defendant never filed a motion to sever before trial. The trial court cannot address issues that were not presented to it. (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1468-1468 [trial court did not err in failing to perform a governmental interest analysis when the appellant never asked the court to apply such principles].)

In any event, under the circumstances here, joinder was proper. Section 954 partly provides: "An accusatory pleading may charge two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts . . . ." Whenever such offenses are joined together, however, the court "in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (*Ibid.*)

For purposes of section 954, the phrase "connected together in their commission" is broadly construed. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1218.) The requirement may be satisfied even though " 'the offenses charged "do not relate to the same transaction and were committed at different times and places . . . against different victims." ' " (*Ibid.*, italics omitted.) Under such circumstances, joinder is proper " ' "if

there is a common element of substantial importance in their commission . . . .” ’ ” (*Ibid.*)

In this case, the requirements for joinder were satisfied. The victims here were bandmates and friends, and each case involved defendant sending messages to the victims using Twitter throughout the same time period. Thus, the charges showed common elements of substantial importance. Both stalking and criminal threats also require a person to make a threat against another. (§§ 646.9, subd. (a) [“Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking”], 422, subd. (a) [“Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat . . . and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family’s safety” is guilty of making a criminal threat].) Thus, the offenses charged were also of the same class of offense and were properly joinable.

Having determined that the counts were properly joined, defendant can predicate error on failing to sever the counts “only on a clear showing of potential prejudice.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.) He has failed to meet this burden.

When determining whether it would be unduly prejudicial to try properly joined crimes, courts look to the following criteria: (1) evidence of the crimes would not be cross-admissible; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a weak case has been joined with a strong case, or with another weak case, so that the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges

carries the death penalty or joinder of them turns the matter into a capital case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

Here, the evidence was cross-admissible to show defendant's intent. (Evid. Code, § 1101, subd. (b) [evidence of other crimes is admissible when relevant for noncharacter purpose of proving some fact other than the defendant's criminal disposition, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake of fact or accident].) Defendant's intent to make a threat that placed each victim in reasonable fear when he sent the social media messages was at issue for all of the charges (§§ 646.9, subd. (a), 422), and the evidence of the tweets he sent to the three victims were sufficiently similar to prove that he probably harbored the same intent in each instance. (*People v. Leon* (2015) 61 Cal.4th 569, 598 [" 'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.' "].)

Even if the evidence was not cross-admissible, severance was not required. "[T]he absence of cross-admissibility alone would not be sufficient to establish prejudice where (1) the offenses were properly joinable under section 954, and (2) no other factor relevant to the assessment of prejudice demonstrates an abuse of discretion." (*People v. Geier* (2007) 41 Cal.4th 555, 577.)

As explained above, the offenses were properly joined. None of the charges were likely to particularly inflame the jury; no one was physically injured, and each charge was predicated primarily on tweets defendant sent to the victims. Nor can it be said that a weak case was joined with a strong case. Defendant admitted that his tweets to H.W. and R.G. were threatening. He also admitted he had sent messages to the singer, which she testified were unwanted, even after he had been served with a restraining order. Finally, this case did not involve a capital crime. Given the above, defendant cannot show prejudice from trying the charged offenses jointly.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

RAYE, P. J.

BLEASE, J.